85-669

Supreme Court, U.S.
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In The Supreme Court of the United States

OCTOBER TERM, 1985

AD HOC COMMITTEE FOR AKWESASNE RIGHTS,
PETITIONER

v.

REYNOLDS METALS COMPANY, A Delaware Corporation, ALUMINUM COMPANY OF AMERICA, A Pennsylvania Corporation, THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS, ET. AL,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the issue of the amount of attorneys' fees awarded to plaintiffs' counsel was not before said Court, when *one* timely Notice of Appeal was submitted which appealed ". . . from each and every part of the Order approving the proposed Settlement Agreement, entered in this action on February 21, 1985" and there were *three* orders issued simultaneously by the District Court all pertaining to the Settlement Agreement?

2. Was the Settlement Agreement approved by the District Court and affirmed by the Court of Appeals of the Second Circuit, fair, adequate and reasonable, in light of the number of objectants to the Settlement Agreement?

3. Was the settlement agreement approved by the District Court and affirmed by the Court of Appeals of the Second Circuit, fair, adequate, and reasonable, seen from a perspective of Mohawk Indians... who have limited mobility to move from their ancestral homeland to escape continued contamination from fluoride pollution?

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RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, the Ad Hoc Committee for Akwesasne Rights, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 25, 1985.

OPINIONS BELOW

The Opinion of the Court of Appeals, not yet reported, and is attached to this petition as Appendix A. The prior opinion of the United States District Court for the Northern District of New York, not yet reported, is attached to this petition as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 25, 1985. An untimely petition for rehearing and for leave to amend the notice of appeal was denied on August 16, 1985, and this petition for certiorari was filed within 90 days of the former date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

This case involves Rule 3.c. of the Federal Rules of Appellate Procedure, which provides as follows:

> "CONTENT OF THE NOTICE OF APPEAL. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal."

STATEMENT OF THE CASE

This is a petition by the Ad Hoc Committee for Akwesasne (St. Regis) Rights for review by this Court of the order of the United States Court of Appeals for the Second Circuit (Appendix A, *infra.*) which affirmed the ruling of the District Court of the Northern District of New York (Appendix B, *infra.*) approving settlement of a class action for damages and injunctive relief resulting from fluoride pollution of Cornwall Island, Ontario, and the awarding of attorneys' fees for plaintiffs' counsel.

Respondents in this action include: Council Members of the Canadian St. Regis Band Council Members, and ERNEST BENEDICT, HOWARD F. DAVID, THOMAS DAVID, PHILLIP HOPPS, ANGUS LAZORE, RICHARD MITCHELL, NOAH POINT, LOUIS THOMPSON, RICHARD THOMPSON, individually and as signers of the approval of the settlement agreement. Petitioners have omitted the names of ELIJAH BENEDICT, JAMES THOMPSON and PETER WHITE, who although signers of the settlement agreement, either by themselves (ELIJAH BENEDICT), or through a member of their family (JAMES THOMPSON by his wife ESTHER THOMPSON, and PETER WHITE, by his daughter, MARY WHITE) have withdrawn their names as consenting to the settlement.

The Ad Hoc Committee is comprised of class members and other interested Mohawk Indians, who object to the Settlement Agreement as approved by the District Court. The exact number of objectors is unknown. However, petitions circulated on the St. Regis Reservation in February, 1985 during the hearing of objections to the approval of the Settlement Agreement gained signatures representing more than 400 persons, or nearly one-third of the class membership.[1] (*Pages 19-43 of Petitioners' Appendix)*[2]

The Panamerican/Panafrican Association, Baldwinsville, New York, has provided *pro bono* counsel

to enable the Ad Hoc Committee to pursue their objections.

Cornwall Island, Ontario is an island in the St. Lawrence River on the New York State border that forms part of the Canadian St. Regis Indian Reservation. In 1959, Reynolds Metals Company opened an aluminum smelting plant within one mile of Cornwall Island. The St. Regis Indians in the 1960's noticed lameness and tooth damage in cattle which was ultimately attributed to fluoride emissions. In the early 1970's, Reynolds installed new pollution control equipment in response to requirements imposed by the State of New York.

Environmental damage continues on Cornwall Island from pollutants from respondent aluminum companies. *(Appellants' App. Vol. II, 105, 169, 190, 223); (Vol. I, 33);*

> "Analysis of fluoride content of ambient air and plant life downwind from the Reynolds aluminum reduction facility, as well as evidence of fluoride-related disease in cattle on Cornwall Island, indicate that environmental contamination of the St. Regis Reserve by the Reynolds facility's stack emissions has indeed occurred. Since fluorides are not the only constituents of the plant's emissions, fluoride level may be considered an index of other possible pollutants from the stacks." [3]

Concerned that their cattle and crops were still being injured and that people were suffering health damages, and damage to the way of life of the Mohawk Indians by contamination to the land and environment, the Mohawk Indian residents brought their grievance to the International Joint Commission (comprised of the governments of Canada and the U.S. to handle such border concerns). *(Appellees' App. Vol. II, 25-26).* Although their findings were inconclusive, the ICJ recommended further monitoring. *(Appellees' App. Vol. II, 61-62).*

The complaint in this action was filed in February, 1980 against the respondents herein, Reynolds Metals Company (Reynolds) and Aluminum Company of America (ALCOA), the latter of which had an aluminum plant several miles fruther from the Island than the Reynolds

Plant. *(District Court Docket Number 1)*. It alleged injury to animals, vegetation, property and people on Cornwall Island from fluoride and other pollution emitted by respondent plants. The St. Regis Band sought damages and an injunction preventing ALCOA from increasing its emissions and requiring the reduction of emissions at Reynolds *(Docket Number 6)*.

Multiple motions were filed to dismiss or otherwise limit the suit. The Band prevailed in these motions, but the Court limited plaintiffs' claims to those accruing not more than three years prior to the commencement of the action. *(Docket Numbers 9-12, 22-24, 26, 34, 43)*.

In 1981, the Environmental Sciences Laboratory of Mt. Sinai Hospital, under a contract with the Canadian Government, began an extensive $1.6 epidemiological study regarding the possible effects of fluoride, mercury, mirex and PCBs on the health of the Cornwall Island residents. (See footnote, Page). The conclusion of the study was delayed several times and was not released until March, 1984. *(Appellees' Supp. App., Vol. I, 30-31)*.

The Mount Sinai report concluded that there was no scientific correlation of cause and effect between the pollution from respondents' aluminum plants and injury to human health of residents of Cornwall Island. The study, however, did not preclude the possibility of future clinical disorders and advised the continued monitoring of individuals who had high serum fluoride levels.

The motion for preliminary injunction filed concurrently with the action had anticipated utilizing the results of the Mt. Sinai study, and therefore was withdrawn by plaintiffs in 1981, partially because of the delay in the results of the study. *(Appellees' Supp. App. Vol. I, 1-5)*.

Also due to the delay in releasing the results of the health study, the aluminum companies made a motion to dismiss the health claims from the action over the vigorous objection of plaintiffs. the claims for injury to human health were dismissed without prejudice.

Meanwhile, extensive discovery, including depositions of fact and expert witnesses, interrogatories, document production, inspections of respondents' plants, and inspections of Cornwall Island cattle and vegetation continued. *(Appellees' Supp. App. Vol. I, 41-53).*

Continuing injury to cattle and hay was noted, although the damage was not demonstrably as great as had been anticipated. An expert of plaintiffs' in land appraisal found a reduction in value of the land for agricultural use from pollution of $3.7 million dollars. *(Appellees' Supp. App., Vol. I, 194).* However, evidence with the apparent purpose of counter-balancing this loss, presented evidence that the value of land for residential purposes had increased.

Thereafter, a settlement of $650,000 (Canadian) was proposed, to be divided between the Band as farmers with plaintiffs' attorneys to receive $300,000 (Canadian) from the settlement amount. *(Appendix C, infra.)*

The farmers' portion was to be used for feed, hay and the like and to purchase pure-bred cattle to replace older breeding cows. Reynolds was to pay for any cattle or hay with certain signs of fluoride for ten years. There was no provision of any kind concerning emission reduction, controls or monitoring; or plant expansion.

In October, 1984, the Band Council approved the settlement agreement. *(Appellees' Supp. App., Vol. I, 150).* Opposition to the proposed settlement agreement organized itself and formed the petitioner's group, the Ad Hoc Committee, under the leadership of former St. Regis Band Council Chief Lawrence Francis, who had first-hand knowledge of the history and development of the litigation. Public meetings were held on the reservation in which opposition formed around the fact that there were no provisions in the settlement for decreasing or controlling emissions or limiting the expansion of the plants.

In December, 1984, a joint motion for approval of the settlement and for attorneys' fees was filed. *(Appellees'*

Supp. App. Vol. I, 38-61). Notice was sent to the class announcing hearings on the settlement and attorneys' fees for February 7, 1985. *(Appellees' Supp. App. Vol. I, 44-54).*

Petitioner's counsel appeared in a three-day hearing presenting 11 witnesses stating their objections to the class action settlement on behalf of the petitioner Ad Hoc Committee. (See generally transcript of hearings, *Vol. II, Appellees' Supp. App.)*

Petitioner's witnesses included Elijah Benedict, one of the 12 named class action plaintiffs *(Appellees' Supp. App. Vol. II, 95-104)* and members of the families who spoke on behalf of three other named class action plaintiffs.[4] They described their misunderstanding of the terms of the settlement by describing, *inter alia*, the house-to-house visits of plaintiffs' counsel to gain the signatures of the named class members and certain other landowners on the Island. According to testimony, the meetings were short, purporting to review a 40 page legal document and no copies were left with the signators.

During the course of the hearing, as awareness of the issues of the settlement became known, opposition mounted and petitioners gathered signatures opposing the settlement agreement (See footnote on Page 3). The petitioners were presented to the court as a showing of the extensive nature of the opposition to the settlement as proposed with a motion to extend the hearing to determine the numerical extent of the opposition. *(Appellees' Appendix, pages 19-55).* The motion was denied. *(Appellees' Supp. App. Vol. II, 395-420).*

Notwithstanding the objections, the settlement agreement was approved by the District Court, as well as counsel fees of which comprised approximately 46% of the award. Three orders regarding the settlement came down simultaneously. One approving the settlement agreement per se, made reference to the payment of attorneys' fees, one order was for the approval of the

attorneys' fees, and another order gave a schedule for payment contingent upon the appeal of the orders.

The Second Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH RULINGS OF THIS COURT, REGARDING "HARMLESS ERROR" IN THE DRAFTING OF NOTICES OF APPEAL.

The Circuit Court erred when it held that the issue of the amount of the award of attorneys' fees to plaintiffs' counsel was not before the Court. The ruling is in direct conflict with *Foman v. Davis,* 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed2d 222, 6 FR Serv2d 73b.21, Case 1., (1962), and its progeny. In the *Foman* case, this Court reversed the Court of Appeals for error in holding that the notice of appeal was ineffective for the review of the original judgment by reason of its failure to designate it.

> "The defect in the second notice of appeal did not mislead or prejudice the respondent. With both notices of appeal before it (even granting the asserted ineffectiveness of the first), the Court of Appeals should have treated the appeal from the denial of the motions as an effective, although inept, attempt to appeal from the judgment sought to be vacated. Taking the two notices and the appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of the motions was manifest. *Not only did both parties brief and argue the merits of the earlier judgment on appeal, but petitioner's statement of points on which she intended to rely on appeal, submitted to both respondent and the court pursuant to rule, similarly demonstrated the intent to challenge the dismissal."* (emphasis added)

Foman, id., 371 U.S. at 181, 182.

In the case at bar, three orders relating to approval of the settlement agreement were handed down by the District Court on February 21, 1985, the last day of a four-day hearing. The primary order approved the settlement agreement. A second order approved the amount of attorney's fees requested by plaintiffs' counsel, and a third

order set a schedule, contingent upon appeal of the orders.

Since all three orders came down simultaneously, it is not possible to say which one is the "final" order chronologically. Functionally, however, since the other two orders could not exist independently, the primary order must be seen as the "final" order. A notice of appeal from a "final" order, by a liberal construction of this rule will allow an appeal of a prior non-final order provided that the notice of appeal does not indicate specific orders that independent of one another, thereby indicating a clear intention to exclude an order(s). *Eisenstein, supra,* at 740.

The case fits squarely within the holding of *Foman.* Petitioner's notice of appeal is a notice of an appeal ". . from each and every part of the Order approving the proposed Settlement Agreement, entered in this action on February 21, 1985." *(Appendix D, infra).*

The "ORDER APPROVING SETTLEMENT OF CLASS ACTION" states that "the Settlement Agreement, dated December 19, 1984, presented to the Court for approval pursuant to Fed.R.Civ. Proc. 23(e) is hereby approved." The Settlement Agreement states at page 3, paragraph 2:

> *"Band Agricultural and Economic Development Fund*-Within twenty (20) days after Court approval of this Settlement Agreement, Defendants shall pay to the Band for and on behalf of the Plaintiffs $411,000 (Canadian), subject to paragraph 8 hereof, to be used as the Band sees fit for the agricultural and economic development of the Band and its members, *and for payment of such of the Band's litigation expenses as may be approved by the Court."* (emphasis added).

(Appellees' Supp. App. Vol. I, 111).

Clearly, the three simultaneously issued orders were interdependent and closely related. The notice of appeal, by its wording, did not exclude any part of the totality of the Settlement Agreement. "It is true that failure to designate a particular part is not fatal if the intent to appeal from that part can fairly be inferred from the parts actually designated, as will often be the case where the

parts are related." 9 Moore's Federal Practice, Paragraph 203.18, pages 3-78.

That petitioner did not make separate notices of appeal for each order, should be seen as "harmless error" (*United States v. Arizona*, 346 U.S. 907, 74 S.Ct. 239, 98 L.Ed. 405, [1953]; *Conway v. Village of Mount Kisco, N.Y.*, 750 F.2d. 205, 211 [2nd Cir.]) and ". . . the notice shuld not be used as a technical trap for the unwary draftsman." *Blitzstein v. Ford Motor Co.*, 288 F.2d. 738, 4 FR Serv2d 73B.12, Case 2, (CA 5th, 1961).

Also consistent with *Foman*, both petitioners and plaintiffs argued the merits of the amount of attorneys' fees and fully briefed the issue before the Second Circuit. Hence, this omission of a specific notice of appeal regarding the attorneys' fees cannot be said to have mislead or prejudiced the appellee.

> ". . .a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not mislead by the mistake." (footnotes omitted)

9 Moore's Federal Practice, Paragraph 203.18, page 3-76, 77). Moreover, pages 38-92 of Appellees' Supplemental Appendix, Volume I, presented to the Second Circuit is the petition for Attorneys' Fee, draft order and affidavit with attachments regarding the awarding of attorneys' fee to plaintiffs' counsel.

The issue involved in this petition is extremely important both in its own right and in the context of the litigation in which it arises. The Second Circuit sets a dangerous precedent in allowing harmless error to preclude the review of the merits of the amount of attorneys' fees awarded to plaintiffs' counsel.

Petitioners believe that the amount of attorneys' fees awarded is appropriate for review in light of the wide divergence of case law on the approval of such applications.

2. THE DECISION BELOW RAISES A SIGNIFICANT AND RECURRING PROBLEM CONCERNING THE LACK OF WELL-ARTICULATED STANDARDS FOR THEREVIEW OF A CLASS ACTION SETTLEMENT IN THE FACT OF SIGNIFICANT DISSENT FROM THE CLASS.

This petition presents an important issue that has not been addressed by the Supreme Court regarding the standards to be applied by the trial court in the exercise of its discretion in approving a class action settlement agreement, in the face of significant opposition from within the class. The percentage of objectors to the class sufficient to warrant the District Court to disapprove of a class action settlement, of the consideration of the number of objectors to other factors in considering approval has not been determined by this Court.

The dilemma created by an absence of a standard is described in *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir., 1978), 1216:

> "No simple percentages are determinative, of course, and each case must turn on its own facts. While recognizing the difficult task facing the district court *in the absence of crisp guidelines and well-articulated standards for review of a settlement in the face of significant dissent from the class,* we are firmly convinced that under the peculiar circumstances of this case, approval of the settlement in the face of such widespread dissent evidenced below constituted an abuse of discretion." (emphasis added)

In *Amalgamated Meat Cutters of North America v. Safeway Stores, Inc.*, 52 FRD 373 (D.Kan. 1971), 22 members of 55 objected and the proposed settlement was not approved.

Some circuits have ruled that a class action settlement may be approved even where there are a large number of objectors. *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456 (2nd Cir., 1982); *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3rd Cir., 1974); *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977); 3B Moore's

Federal Practice at Para. 23.80[4] (1979 ed.).

However, the Second Circuit has also ruled that a judge in acting as a guardian ". . . must be convinced that the number of objectants is small." *George v. Parry,* 77 FRD 421 (S.D.N.Y., 1978), aff'd. 578 F.2d 1367, cert. denied, 99 S.Ct. 340, 439 U.S. 947. Confusion due to a lack of a discernible standard is apparent.

In the case at bar, petitioners respectfully submit that the number of objectants (32.8% of the class as calculated by petitioners' petitions gathered in February, 1985) was substantial enough to warrant a ruling that the Court abused its discretion in approving the settlement agreement.5

3. THE DECISION BELOW RAISES A SIGNIFICANT PROBLEM CONCERNING THE CHOICE OF A STANDARD IN DETERMINING WHETHER A CLASS ACTION SETTLEMENT AGREEMENT IS "FAIR, ADEQUATE OR REASONABLE."

A corollary issue to the above, is how the court is to determine the basis for the standard of "fair, adequate and reasonable" for the approval of a class action settlement agreement. *Weinberger v. Kendrick,* 698 F2d. 61, 73 (2nd Cir., 1982). When the Court applies this standard, *to whom* is the settlement agreement *fair, adequate and reasonable*? Is this a "reasonable person" standard? Or, as in the case at bar, is it the standard of a Mohawk Indian in the context of his history, immobility, socio-cultural attributes, etc.

In the instant case, the objectors opposed the fact that the settlement agreement made no provisions for what they thought to be the gravamen of the action - provisions which addressed fluoride pollution control or reduction or an understanding about the expansion of the plants.

Respondent companies in the appeal before the Second Circuit equated the lack of testimony regarding the amount of the monetary settlement with a lack of objection to the terms of the settlement. Testimony elicited

showed that the overwhelming focus of concern of the objectors were provisions for reduction of fluoride emissions, and the Attorneys' fees which actually decreased the settlement, without which, the amount of monetary damages was not consequential.

To be "fair, adequate and reasonable," the question of emissions had to be addressed in some manner, they argued. The issue cannot be considered outside of the context of Mohawk Indians as owners/residents of Cornwall Island, who cannot simply claim a monetary settlement, "pack up their bags" and move to another location. The reservation is their ancestral homeland. *(Appellees' Supp. Aff. Vol. II, 17, 74, 84, 377).*

What is regarded as "fair" by the District Court is seen by the Mohawk people as a kind of self-perpetuating "salvage operation" which treats the ipso post facto symptoms of pollution and ignores the cause. . . replaces diseased cattle as they become ill or die. . . awaits long-term effects of fluoride pollution on human health. . . or finances the cultivation of contaminated crops to be discarded as unfit for consumption and charged off to the aluminum companies.

Rather than engage in a dispute about the amount of the monetary settlement, the objectors have urged that the contamination of their homeland through ambient pollutants be minimized in whatever way possible. *(Appellees' Supp. Aff. Vol. II, 83, 149, 203, 237, 243-244).* They did not ask that the aluminum plants be closed down. *(Appellees' Supp. App. Vol. II, 295).* They have asked for the installation of state of the art anti-pollution equipment.

Reynolds has claimed that the reduction of pollutants by the installation of improved equipment would entail an expenditure of at least $40 million. *(Appellees' Supp. App. Vol. II, 366).* Through discovery, plaintiffs presented to the District Court a report done by the PEDCO Company, whose experts made an on-site inspection of the Reynolds plant and determined that Reynolds

had options other than the installation of a completely new anti-pollution system. *(Appellees' Supp. App. Vol. II, 256-270, 363-370).* They also determined that other functionally similar aluminum plants owned by Reynolds emitted considerably less pollutants than the Massena, N.Y. plant. The District Court made no factual determination on the record of the conflict on this issue.

The objectors measured what was fair in terms of the projected future long-term effects of pollutants at present levels on the Reservation, with a projection of its affects on their children and generations to come. For them, a cash settlement without increased pollution control was not "fair" and not "reasonable" nor in any sense "adequate".

The District Court either ignored the petitions of those class members or held the number, if considered at all, as insufficient in approving the settlement. There is no indication on the record what determination of fact the Court made of petitioner's offer of proof regarding the number of objectants.

This case presents a novel issue to the court. The significance of the number of objectors to a class action settlement, and right of American Indians to self-determination in setting their own standards for fairness, adequacy and reasonableness.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

FOOTNOTES

1. There were 204 signatures of adults. The figure of 222 is added to 204 to get the total number of 426. 222 is the number of children of the adult signers. Since the class membership of approximately 1300 persons is comprised of the complete list of enrolled Mohawk Indians (which includes children), the children are added for the purpose of computing this number and calculating the percentage of objectors to the total number of class plaintiffs. Based on these figures, 32.8% of class membership are objectors.

2. All references to documents refer to documents submitted on appeal to the Second Circuit, unless otherwise indicated. Although these documents (except for the appendix which follows) are not included as a part of the appendix of this petition for certiorari, citations are made for the future reference of this Court.

3. Excerpt from page S-6, *Environmental Contaminants and the Health of the People of the St. Regis Reserve,* prepared by Environmental Sciences Laboratory, Mount Sinai School of Medicine, of the City University of New York, NY, NY, 1984.

4. Mary White appeared on behalf of her father, PETER WHITE, who she testified is an invalid. Esther Thompson appeared on behalf of her husband, JAMES THOMPSON, who was unable to attend the hearings. The court is a seven hour round-trip by car from Cornwall Island, and therefore, those persons who did attend, did so at great expense and inconvenience.

ANDY SQUARE appeared on behalf of his father JAMES SQUARE, who he testified was ill and unable to attend. Mr. SQUARE was mistakenly listed as a council member in the action below, but he was a named class member/farmer. DOREEN THOMPSON appeared on behalf of her husband FRANK THOMPSON, who was unable to attend. Mr. Thompson was a farmer/cattle owner who met the criteria for listing as a class action plaintiff/farmer.

5. See Footnote Number 1.

APPENDIX A

In the United States Court of Appeals
for the Second Circuit

Civil No. 85-7187

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS BY ANGUS BONAPARTE, JR., ET. AL.

v.

REYNOLDS METALS COMPANY, A DELAWARE CORPORATION, ALUMINUM COMPANY OF AMERICA, A PENNSYLVANIA CORPORATION,

(Filed: June 25, 1985, Elaine B. Goldsmith, Clerk)

The Ad Hoc Committee for Akwesasne Rights appeals from an order of the United States District Court for the Northern District of New York, Howard G. Munson, *Judge,* approving settlement of a class action.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

On consideration whereof, the order of the district court is hereby affirmed.

Approval of a class action settlement will only be reversed when "the objectors to that settlement have made a clear showing that the District Court has abused its discretion." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2nd Cir. 1974). Even if a district court fails adequately to set forth either its reasons for approving a settlement or the evidence on which they were based, a reviewing court should be "properly reluctant" to overturn the approval if the record contains adequate facts to support the approval. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 437 (1968). In the present case the record provides

more than adequate evidence to uphold the settlement approval.

The record discloses that Judge Munson was very familiar with the case because of his close involvement with it for over five years; that the settlement had been reached only after extensive arms' length negotiations between counsel for the parties; that the potential recovery, even using plaintiffs' own calculations, was likely to be only a fraction of the settlement; that independent counsel had corroborated plaintiffs' attorneys' evaluation of the case; that the health claims were not resolved one way or another by the settlement, and unless settled separately could still be brought at any time; that plaintiffs' counsel had diligently attempted to obtain settlement provisions regarding emission reductions, although the attempt was not successful; and that disapproval of the settlement and trial of the case would not further the Ad Hoc Committee's desire for further emission reductions. Moreover, all these facts were pointed out by Judge Munson at the time of the hearings on the settlement proposal.

The district court's findings, and the facts in the record supporting them, clearly show that the settlement was fair, reasonable, and adequate. Therefore there is no merit to appellant's claim that the decision of the district court was made without adequate findings of fact and conclusions of law. We also find no merit in appellant's remaining arguments, including its claims that the district court unduly relied on the recommendations of cousnel; that the number of objectors requires that the settlement be reversed; that a guardian ad litem of infant class members should have been appointed; or that the notice given for the settlement hearings was inadequate. Since no appeal was taken from the district court's separate order on attorneys' fees, that issue is not before us.

We therefore affirm the order approving the settlement.

ELLSWORTH A. VAN GRAAFEILAND, U.S.C.J.

GEORGE C. PRATT, U.S.C.J.

EDWARD D. RE, CHIEF JUDGE, U.S.C.I.T.

APPENDIX B-1

In the United States District Court
for the Northern District of New York

Civil No. 80-CV-135 (HGM)

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS, ET. AL.,

v.

REYNOLDS METALS COMPANY AND ALUMINUM COMPANY OF AMERICA

(Filed: February 22, 1985, J.R. Scully, Clerk)

ORDER

Upon consideration of the petition for attorneys' fee filed by plaintiffs' counsel, and of the argument and evidence presented by the parties and/or members of the class at a hearing held, after notice to the class, on February 7, 11, 12, and 21, 1985, it is hereby ORDERED:

1. That the petition for attorneys' fee is hereby granted.

2. That plaintiffs' attorneys, Sonosky, Chambers & Sachse are hereby awarded a fee of the equivalent, at current rates of exchange, in U.S. dollars of $297,086.00 (Canadian), or $222,814.50 (U.S.), whichever is greater.

3. That defendants are to pay said amount to plaintiffs' attorneys and deduct it from the fund described in Paragraph 2 of the Settlement Agreement herein.

4. That the Band is authorized to pay plaintiffs' counsel not more than $4,000 (U.S.) from the fund described in Paragraph 2 of the Settlement Agreement for unpaid expenses upon presentation of documentation satisfactory to the Band.

5. That the Band is authorized to use an amount not to exceed $21,000 (U.S.) plus $7,000 (Canadian) from the fund described in paragraph 2 of the Settlement Agreement to pay outstanding expert witness fees.

HOWARD S. MUNSON

United States District Judge
Dated: February 21, 1985

APPENDIX B-2

In the United States District Court

for the Northern District of New York

Civil No. 80-CV-135 (HGM)

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS, ET. AL.

v.

REYNOLDS METALS COMPANY AND ALUMINUM COMPANY OF AMERICA

(Filed: February 22, 1985, J.R. Scully, Clerk)

ORDER

Paragraphs 2, 3, 4 and 5 of the Settlement Agreement approved by Order of this Court entered this date require Defendants to pay certain amounts to the Band, to Noah Point and to Guaranty Trust Company of Canada within twenty (20) days after Court approval of the Settlement Agreement. This Court has noted that these provisions do not take into account the possibility that some members of the class may file an appeal from the Order approving the Settlement Agreement, and that such an appeal may be filed within thirty (30) days after the date of such Order. Accordingly, pursuant to paragraph 3 of such Order by which this Court retained jurisdiction over all matters pertaining to the administration of the Settlement Agreement it is hereby ORDERED that:

1. Defendants shall pay the amounts provided in paragraphs 2, 3, 4 and 5 of the Settlement Agreement, as adjusted on this date pursuant to paragraph 8 of the Settlement Agreement, to Harry R. Sachse, Esq., attorney for Plaintiffs, who shall hold such amounts in escrow in an interest-bearing account in Guaranty Trust Company of Canada, Cornwall, Ontario.

2. If an appeal from the Order approving the Settlement Agreement is not filed, Mr. Sachse, at the expiration of five (5) business days following the expiration of such appeal period, shall pay such amounts to the Band, to Noah Point, and to Guaranty Trust Company as provided in paragraphs 2, 3, 4 and 5 of the Settlement Agreement; except that the payment provided in paragraph 2 of the Settlement Agreement shall be reduced by the amount of the attorneys fees allowed by this Court, and Mr. Sachse shall pay the amount of such attorneys fees to Sonosky, Chambers & Sachse. In such event, interest which has accumulated in such escrow account, after deducting the escrow costs, shall be paid to the Band to be used by the Band as provided in paragraph 2 of the Settlement Agreement.

3. If an appeal from the Order approving the Settlement Agreement is filed, Mr. Sachse shall continue to hold such amounts in escrow until ultimate resolution of the matter by an appropriate court. Such "ultimate resolution" shall be deemed to have occurred when an appropriate court has entered an order disposing of the appeal or the issue raised in the appeal, and the time period has expired for seeking any further review by the courts.

4. If such ultimate resolution is an approval of the Settlement Agreement, Mr. Sachse shall pay such amounts, including accrued interest less escrow costs, in the manner set forth in paragraph 2 of this Order.

5. This Court has noted that the dates and time periods specified in the Settlement Agreement for the disbursement and expenditure of the amount to be paid by Defendants to Guaranty Trust Company of Canada (paragraph 5), for audit reports and reallocation of funds (paragraphs 10 and 11), and for the future cattle and hay purchase programs and the release of liability during the period of such programs (paragraphs 14 and 1(b)), were based on the presumption that final approval of the Settlement Agreement would occur no later than November 30,

1984. If an appeal from the Order approving the Settlement Agreement is filed and the ultimate resolution by the courts is an approval of the Settlement Agreement, this Court has concluded that the above-referenced dates and time periods should be adjusted to account for the delay which would accompany such an appeal in order to preserve the intent of the aprties in specifying such dates and time periods in the Settlement Agreement. Accordingly, if an appeal from the Order approving the Settlement Agreement is filed and the ultimate resolution by the courts is an approval of the Settlement Agreement, the above-referenced dates and time periods (with the exception of the date of August 1, 1984 in the introductory sentence of subparagraph 5(f), which date is adjusted in paragraph 6 of this Order) shall be adjusted so that such dates and time periods are determined by, and begin to run from, the date of ultimate resolution rather than November 30, 1984. The length of the time intervals provided in the settlement Agreement shall remain the same, and only the dates and time periods set forth in the Settlement Agreement shall be adjusted so that they are consistent with the change from November 30, 1984 to the date of ultimate resolution. Upon such ultimate resolution, counsel for the parties shall jointly prepare a memorandum for the convenience of the COurt, the parties and Guaranty Trust Company of Canada, setting forth the various dates and time periods as adjusted pursuant to this Order.

6. This Court has also noted that the date of August 1, 1984 in subparagraph 5(f) of the Settlement Agreement as used to define the cows eligible for replacement under that subparagraph was intended to limit the number of such cows in order to encourage the replacement of cows which were in Cornwall Island herds on August 1, 1984, and to prevent artificial expansion of the herds under the cattle replacement program. However, if an appeal from the Order approving the Settlement Agreement is filed, some

cows which would have been eligible for replacement under subparagraph 5(f) may be sold or otherwise disposed of before the appeal is resolved and the replacement program can commence. Accordingly, if an appeal from the Order approving the Settlement Agreement is filed and the ultimate resolution by the courts is approval of the Settlement Agreement, the eligibility date of August 1, 1984 shall remain the same but with the further provision that for every cow that was in Cornwall Island herds on August 1, 1984 but is not in the herds on the date of ultimate resolution, one additional cow that is in the Cornwall Island herds on the date of ultimate resolution shall be eligible for replacement.

7. If such ultimate resolution is a disapproval of the Settlement Agreement, Mr. Sachse shall pay such amounts, including accrued interest less escrow costs, to Reynolds Metals Company, which shall pay to Alcoa a proportionate share of such amounts and interest based on Alcoa's contribution to such amounts.

HOWARD S. MUNSON
United States District Court

Dated: February 21, 1985

APPENDIX B-3

In the United States District Court
for the Northern District of New York

Civil Number 80-CV-135 (HGM)

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS, ET. AL.

v.

REYNOLDS METALS COMPANY AND ALUMINUM COMPANY OF AMERICA

(Filed: February 22, 1985, J.R. Scully, Clerk)

ORDER APPROVING SETTLEMENT OF CLASS ACTION

Upon consideration of the parties' Joint Motion for Approval of Settlement Agreement, and of the arguments and evidence presented by the parties and certain members of the class at a hearing held, after notice to the class, on February 7, 11, 12 and 21, 1985, it is hereby ORDERED:

1. That the Settlement Agreement, dated December 19, 1984, presented to the Court for approval pursuant to Fed.R.Civ.Proc. 23(e) is hereby approved.

2. That this case is hereby dismissed with prejudice, each party to pay its own costs and disbursements.

3. That this Court, pursuant to paragraph 20 of the Settlement Agreement shall retain jurisdiction over all matters pertaining to the administration, interpretation and enforcement of the Settlement Agreement and to the performance of the Plaintiffs and Defendants thereunder.

4. That this Court shall retain jurisdiction over all matters pertaining to the administration, interpretation and enforcement of all confidentialty and protective orders entered, and all confidentiality agreements executed by attorneys, parties and/or experts in the course of the litigation of this case, and to the performance of the Plaintiffs, the Defendants, their experts and all others thereunder.

HOWARD G. MUNSON
United States District Court

Dated: February 21, 1985

APPENDIX C

In the United States District Court
for the Northern District of New York

Civil No. 80-CV-135 (HGM)

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS, ET. AL.,

V.

REYNOLDS METALS COMPANY AND ALUMINUM COMPANY OF AMERICA

(Filed: December 26, 1984, J.R. Scully, Clerk)

NOTICE OF SUPPLEMENTATION OF CLASS AND OF PROPOSED SETTLEMENT OF CLASS SUIT

TO ALL PERSONS WHO HAVE LIVED ON CORNWALL ISLAND, ONTARIO, OR OWNED PROPERTY THEREON, AT ANY TIME FROM FEBRUARY 11, 1977 TO THE PRESENT:

YOU ARE HEREBY NOTIFIED by order of this Court that the Court has supplemented the class in the above entitled action and is considering approving a settlement of the case. A hearing will be held on February 7, 1985 at 1:30 p.m. at the United States District Court for the Northern District of New York in the United States Court House, 100 S. Clinton Street, Syracuse, New York, to consider a joint application of all the parties for approval by the Court of the settlement and to consider a petition for attorneys' fee filed by Plaintiffs' attorneys. You may participate at that hearing if you wish. Read this notice carefully, as it describes your rights as a member of the class and the terms and conditions of the proposed settlement.

Members of the class who receive this notice are asked to pass this information on to friends and family members who are possible members of the class, particularly those who no longer live on Cornwall Island, and who may not

have received this notice. Additional copies of this notice are available from the Clerk of the Court, the attorneys for the Plaintiffs, or from the tribal offices of the Plaintiffs, Canadian St. Regis Band of Mohawk Indians.

Supplementation Of Class

[This Section Deleted]

Settlement Agreement

By notice sent and advertised in the fall of 1982 the class was notified of the above-entitled action. Plaintiffs alleged that fluoride and other air emissions from Defendants' aluminum plants had damaged the property, animals, vegetation and people on Cornwall Island. The Plaintiffs sought damages and injunctive relief. The Canadian St. Regis Band of Mohawk Indians, by its Chief and Council Members, and the class representatives, have entered into a Settlement Agreement dated December 19, 1984 with Defendants Reynolds Metals Company and Aluminum Company of America. The Settlement Agreement provides for payment by Reynolds and Alcoa as follows:

(a) $15,000 (Canadian) to pay Plaintiff Noah Point for cattle he had previously replaced during the pendency of this litigation.

(b) $35,000 (Canadian) to pay for cattle on Cornwall Island inspected by Plaintiffs' and Defendants' experts during the inspections of 1981 and 1982 which were found by either Plaintiffs' or Defendants' experts to have fluoride tooth gradings of 4 or 5.

(c) $30,000 (Canadian) to pay for the services of cattle and vegetation consultants over a three year period to advise the residents of Cornwall Island regarding agricultural matters.

(d) $5,000 (Canadian) per year for three years to pay for veterinary services for cattle farmers on Cornwall Island.

(e) $3,000 (Canadian) per year for three years to purchase supplemental feed for cattle farmers on Cornwall Island.

(f) $5,000 (Canadian) per year for three years to purchase hay for cattle farmers on Cornwall Island.

(g) $35,000 (Canadian) to pay for scholarships for education of Cornwall Island residents in agricultural areas, over a five-year period, which may be extended.

(h) $85,000 (Canadian) to pay for the replacement and upgrading of the quality of cattle on Cornwall Island, over a three-year period.

(i) $411,000 (Canadian) to be used as the Band sees fit for the agricultural and economic development of the Band and its members, and for payment of such of the Band's litigation expenses as may be approved by the Court.

These payments total $650,000 (Canadian). The Settlement Agreement provides that if on the date of Court approval of the settlement the value of the Canadian dollar is below $.75 (U.S.), the total value of the settlement will be $487,500 (U.S.), and that if the value of the Canadian dollar is above $.80 (U.S.) the total value of the settlement will be $520,000 (U.S.) The payments under the Settlement Agreement are to be made within 20 days after Court approval of the Settlement Agreement.

The Settlement Agreement further provides that for a period of 10 years Reynolds will purchase $1,000 (Canadian) per animal cows which have fluoride tooth grading scores of 4 or 5, with an adjustment to the $1,000 (Canadian) payment for young animals and with an adjustment for inflation. At Reynolds option, it may pay $600 (Canadian) per cow, but permit the farmer to keep the cow. The Settlement Agreement also provides that during a period of seven yeras ending in 1994, Reynolds will purchase for $1 (U.S.) per bale (adjusted for inflation) hay harvested on Cornwall Island having a fluoride content in excess of 40 ppm.

The Settlement Agreement provides for the settlement, release, and dismissal with prejudice of all claims (other than claims for alleged damage to human health, which

claims were previously dismissed without prejudice) asserted by or on behalf of the Plaintiffs or the class members in this case, or which could have been asserted in this case, or which arose at any time before the date of the Settlement Agreement and are attributable to emissions from either or both of Defendants' Massena plants. Without limiting the forgoing, the Settlement Agreement also provides for the release and discharge by Plaintiffs and the class members of all claims related to alleged injury to cattle or hay attributable to emissions before November 30, 1994, from the Defendants' Massena plants.

Attorneys' Fee Petition

Plaintiffs' attorneys have petitioned the Court to award them an attorneys' fee of the equivalent in United States dollars of $297,086.00 (Canadian), but not less than $222,814 (U.S.) If approved, the attorneys' fee would be paid from the $411,000 (Canadian) described above.

Plaintiffs have filed an affidavit of Harry R. Sachse in support of the petition for fees. That affidavit states that the attorneys began this suit under a contract with the Band and farmers requiring that the Band pay the attorney monthly fees earned on an hourly basis. The Band paid $32,251 (U.S.) in fees over the first two years of the contract but was unable to pay additional fees. The attorneys, at the request of the Band, entered into a new contract requiring that they be paid out of any recovery by judgment or settlement either their hourly fees, or 20% of the first $2,000,000 (U.S.) of recovery, whichever is greater.

The fee that would be owed under the contract is $339,164.50 (U.S.) based on hours worked. The attorneys have agreed to reduce their fee by about $100,000 (U.S.) as part of the settlement.

A separate petition for attorneys' fees has been filed with the COurt and anyone wishing to contest the fees may do so, as stated below.

The Court Has Not Given Final Approval of the Settlement Described above

[This Section Deleted]

J.R. SCULLY
Clerk of the Court

Dated: December 26, 1984

APPENDIX D

In the United States District Court
for the Northern District of New York

Civil No. 80-CV-135

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS, ET. AL.

v.

REYNOLDS METALS COMPANY, AND ALUMINUM COMPANY OF AMERICA

SETTLEMENT HEARING HELD IN SYRACUSE, NEW YORK, ON FEBRUARY 21, 1985, BEFORE THE HONORABLE HOWARD G. MUNSON, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

APPEARANCES:

SONOSKY, CHAMBERS, SACHSE & GUIDO
Attorneys for Plaintiff
BY: HARRY R. SACHSE, ESQ., of Counsel

VENABLE, BAETJER, & HOWARD
Attorneys for Deft. Reynolds Metals Co.
BY: ROBERT G. SMITH, ESQ., of Counsel

ECKERT, SEAMANS, CHERIN & MELLOTT
Attorneys for Deft. Aluminum Co.
BY: DONALD WINSON, ESQ., of Counsel

SCOTT D. RODMAN, ESQ.
Attorney for AD HOC Group

THE COURT: Well, all right, as certainly the three counsel who have been involved in this case since 1980 are aware, I am quite familiar with this case. Over the last five years, there have been many occasions, and I don't think I am telling any secret to you gentlemen, when I have been quite annoyed with Plaintiff's counsel and Defense counsel because of their involving the Court in the discovery proceedings that went on in this case. As a result of being involved in that, however, I am quite aware of the extensive measures that were taken to arrive at the facts in this case. I was not aware until counsel called me in a conference call that any settlement was even in the offing in this case; however, when I did receive the documents from counsel, I read them carefully and there isn't any question but what in a case such as this the Court should approve a proposed settlement of a class action if the proposed settlement is fair, reasonable and adequate.

Now, first of all, the settlement has nothing to do with the health claims and, as the objectants to the settlement know, there is nothing in the settlement with respect to emissions. There is also nothing in the settlement with regard to monitoring because the State or the provinces do the monitoring, not anyone involved in this case. But there is a statement in the settlement that the Defendants in the case will be glad to meet with members of the Band every six months, and I assume that that conversation could involve something to do with monitoring and with emissions.

Now, Mr. Rodman has said that each case must stand on its own facts. And what are the facts in this case? As anyone can see from the affidavit that was submitted by Mr. Sachse with regard to the efforts that he and his office have put forward in attempting to come to the position where they were either able to try this case with a great deal of intelligence or to the position where they could recommend a settlement. Anyone who reads that can see the tremendous amount of effort that was put into this

case by Plaintiff's counsel in an attempt to arrive at a fair, equitable and adequate solution to the problem. Mr. Sachse has said in the hearings before this Court that in order not to trust just his judgment or the judgment of his law firm he hired outside counsel to recommend to him whether or not the settlement that he had negotiated at arms' length, and I am sure it was at arms' length knowing the way they treated each other during the course of this lawsuit, whether or not that settlement was fair and reasonable and adequate. Outside counsel said it was, but later because there was some opposition from the Ad Hoc Committee, another attorney was hired and the attorney recommended to the Ad Hoc attorney, from what I have read, although it is not in the evidence in this case, but I have read in the newspaper that that man started to look at this case with a predisposition toward saying that the settlement was not fair, was not adequate, and should not be entered into. But after reviewing whatever it was that was submitted to him, he changed his mind and recommended that it was fair and was adequate and was something that should be entered into between the parties.

As I said a moment ago, there isn't any question but what this settlement was reached only after extensive, arms' length negotiations, and those negotiations were preceded by a five-year period of extensive discovery and analysis of the legal sufficiency and the fact bases for the claims that were alleged. After that settlement was reached, notices were sent out to the parties involved. I understand that there were several meetings. I believe one of the documents says that there were four meetings of the Band wherein this settlement was discussed. I know that there was some opposition to this settlement. In fact, as I understand it, the Chief would not sign it until he had heard from the counsel that was hired on the recommendation of the Ad Hoc committee. It seems to me that because of the procedures that were used in this case to give everyone, every class member an adequate opportun-

ity to be heard and to voice their objections, that it is a little late for objections at this time.

Now, Mr. Rodman has filed these two affidavits. They will be a part of this file. I don't know what counsel wishes me to do, whether this settlement was approved or not, with regard to the allegations that they have made directed toward those two submissions by Mr. Rodman. In any event, they are a part of the file of this case and I will take a look at them within the next week or two to see whether I think anything should be done with regard to those allegations. What I am saying right now is that I think that based upon the fact that this proposed settlement is fair, reasonable, and adequate, based upon my knowledge of the strength of the Plaintiff's case, balanced against the amount that is offered in settlement, my knowledge about the fact that there was no collusion in reaching this settlement, my knowledge and opinion as to the competency of counsel and, let me say for the record, that all counsel in this case are extremely competent. Mr. Sachse is very knowledgeable in this area and Mr. Smith and Mr. Winson also are knowledgeable and competent.

Based upon the length of time and the stage at which these proceedings are, that is, the amount of discovery that's gone into this case, the knowledge of the attorneys as to what the strength and weaknesses are of their cases, I feel that the settlement should be approved.

Now, I realize that there are members of the class who will react adversely to that, but they are reacting adversely with regard to emissions and the fact is that Mr. Sachse tried very hard to get emissions into this settlement and it does not mean merely because emissions and emission control and pollution is not included in the settlement, doesn't mean that there isn't some other remedy, some other remedy either through the Government of Canada or the Government of the United States or both Governments working in concert with regard to pollution, and I think that this settlement as presented to this Court is

extremely fair, has been worked on very hard by the lawyers at arms' length, and should be approved. Therefore, I am going to approve it and there being no opposition to the attorneys' feese as put in by Mr. Sachse, I shall approve that also. I will grant an Order, however, which will delay the expenditures of any of the funds in this pending appeal and that delay rests on the shoulders of those who appeal. Thank you, gentlemen.

COURT CLERK: Court stands in recess.

APPENDIX E

In the United States District Court
for the Northern District of New York

Civil No. 80-CV-835 (HGM)

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS, ET. AL.

v.

REYNOLDS METALS COMPANY AND ALUMINUM COMPANY OF AMERICA

(Filed: February 21, 1985, J.R. Scully, Clerk)

NOTICE OF APPEAL

Notice is hereby given that the Ad Hoc Committee for Akwesasne Rights appeal to the United States Court of Appeals for the Second Circuit from each and every part of the Order approving the proposed Settlement Agreement, entered in this action on February 21, 1985.

Respectfully submitted,
SCOTT D. RODMAN, Esq.
Attorney for the Ad Hoc
Committee for
Akwesasne Rights
14 Sunset Terrace
P.O. Box 143
Baldwinsville, New York 13027
Tel. (315) 635-7281

APPENDIX F

In the United States Court of Appeals
for the Second Circuit

EXCERPT FROM PLAINTIFF-APPELLEES' BRIEF REGARDING ATTORNEYS' FEES

VII. THE DISTRICT COURT DID NOT ERR IN APPROVING THE ATTORNEYS' FEE.

The short answer to appellants objection to attorneys' fees, Brief at 26, is that no appeal was taken from the Court's award. There were separate petitions to approve the settlement and to award attorneys' fees. Supp. App. Vol. I, 93-108 and Supp. App. Vol. I, 38-61. At the joint hearing on both issues no witness testified against the attorneys' fees. The Court issued separate orders on the settlement and on attorneys' fees. Supp. App. Vol. II, 432-433; Supp. App. Vol. II, 434-435. The notice of appeal referred only to the settlement order. Notice of Appeal, Docket No. 348. And, in light of the lack of testimony opposing attorneys' fees, the omission of attorneys' fees from the notice of appeal does not appear to have been inadvertent.

If the court reaches appellants argument, it is without merit. Before the district court, appellant's *only* objection to the attorneys' fee award was an argument by counsel that the award should be paid by the defendants and not from the settlement fund. Tr. 23-25.

The plaintiffs know of no statutory authority for an award of attorneys' fees against defendants in a case like this, even assuming the plaintiffs are the prevailing parties. Applicant cited no such authority, either here or at the settlement hearing. Thus, there is no basis for shifting the fee to defendants.

Although the appellant did not challenge the amount of the requested fee below, it now contends that the fee is an excessive percentage of the award. In support of this contention, it argues that the key criterion for award of

counsel fees is the amount of the recovery. Appellants Brief at 26. Appellant ignores the recent developments in the law of attorneys' fees. In the Second Circuit, the hours worked and the value of these hours are now the primary criterion. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 468-75 (2d Cir. 1974). The Second Circuit decision in *Grinnell* was part of a nationwide trend which began with *Lindy Bros. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1973). *See Generally* A. Miller, *Attorneys Fees in Class Actions* (Federal Judicial Center 1980).

Under *City of Detroit v. Grinnell Corp., supra,* the starting point for computing the fee is to determine the time reasonably expended, and multiply it by the reasonable hourly rate for that time. *Id.* at 471. "It is only after such a calculation that other less objective factors, can be introduced into the calculus." *Id.* The most important such factor is the attorneys' risk of litigation, which would justify increasing the fee. *Id.* Other factors include the magnitude and complexity of the case, the responsibility undertaken, and the amount recovered, *Id.* at 470, again to increase the fee.

Measured by this standard, the fee award in this case is amply justified by the fee petition and supporting affidavit. That petition reveals that by early July, 1984, when the settlement was first agreed to, the attorneys fee on an hourly basis would have been $297,086.00 (U.S.), and that by the end of August 1984, the fee on an hourly basis would have been $339,164.50 (U.S.). To facilitate the settlement the attorneys agreed with the Band Council in July 1984, before the first meeting with farmers, to accept a reduction of up to 25% of their fee by converting the fee into the same number of Canadian dollars, and to charge no fees for work in completing the settlement. Accordingly the petition requested, and the Court awarded, a fe of the greater of $297,086.00 (Canadian) or $222,814.00 (U.S.), much *less* than the time expended would have justified on an hourly basis.

APPENDIX G

In the United States Court of Appeals
for the Second Circuit

Civil Number 85-7187

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS, ET. AL.

v.

REYNOLDS METALS COMPANY, A DELAWARE CORPORATION, ET. AL.

EXCERPT FROM BRIEF FOR APPELLANTS

The Ad Hoc Committee for Akwesasne Rights' Brief before this Court included a section headed by this Caption:

III. SINCE THE NUMBER OF OBJECTANTS IN THE CASE AT BAR IS CONSIDERABLE, THE DISTRICT COURT ABUSED ITS DISCRETION IN APPROVING THE SETTLEMENT.

Supreme Court, U.S.
FILED
NOV 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AD HOC COMMITTEE FOR AKWESASNE RIGHTS,
Petitioner,

v.

REYNOLDS METALS COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MEMORANDUM IN OPPOSITION OF THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS AND ASSENTING CLASS REPRESENTATIVES

HARRY R. SACHSE *
KEVIN A. GRIFFIN
SONOSKY, CHAMBERS & SACHSE
1050 - 31st Street, N.W.
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(202) 342-9131

Counsel for the Canadian St. Regis Band of Mohawk Indians and Assenting Class Representatives

* Counsel of Record

November 14, 1985

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-669

AD HOC COMMITTEE FOR AKWESASNE RIGHTS,
Petitioner,

v.

REYNOLDS METALS COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MEMORANDUM IN OPPOSITION OF THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS AND ASSENTING CLASS REPRESENTATIVES

Petitioner seeks certiorari on two grounds: 1) that the Court of Appeals erred in holding that it had not appealed from the award of attorneys' fees, and 2) that the settlement should not have been approved.

1. On the settlement, we rely principally on the opinions of the district court and the court of appeals. We add the following. After extensive discovery and preparation for trial it became clear that plaintiffs' case was not nearly as strong as we had originally believed. A major

independent health study, upon which plaintiffs were relying to prove human health injury, showed no current injury and predicted no future injury. The cattle and vegetation damage had become dramatically less than before an earlier round of pollution control. Against this background the $666,900.00 (Canadian) settlement for non-health injury only [1] was clearly reasonable.

The settlement was widely explained and discussed and was signed by all the leading farmers of the community. It was reviewed by two outside attorneys, Mr. Bruce Terris, of Washington, D.C., with eminent credentials in environmental law, and Mr. Richard Lippes of Buffalo, New York, selected by petitioner. *Both* recommended the settlement. In short, there is no doubt that the settlement is fair and no reason for this court to review the unanimous decisions of the district court and court of appeals approving it.

2. Petitioner also seeks this Court's review of the court of appeals' ruling that it had not appealed the award of attorneys' fees. Petitioner presents this as inartful pleading on its part and overtechnicality on the part of the court of appeals, but this is not the case.

The fact is that petitioner did not challenge the amount of the attorneys' fee below. This is not surprising. The attorneys originally took this case on an hourly fee basis under a contract with the Band approved by the leading farmers. When it became clear that the Band did not have the funds to pay the attorneys and expert witnesses on an hourly basis, the attorneys agreed to be paid out of the recovery, on a percentage basis but not less than their hourly billings on the case at their ordinary hourly rates.

---

[1] Health claims had been dismissed without prejudice prior to the settlement. The settlement expressly excluded those claims. Thus they may be brought again when and if the evidence merits.

To facilitate the settlement the fees requested (and approved by the district court) were some 25 percent less than the hourly billing. All of this was thoroughly documented in the fee petition. See also Pet. App. at 33-34.

Indeed, the attorney for the petitioner, when asked to give *all* his objections to the settlement, said:

> As far as the fees, [the objectors] will testify * * * that they are very grateful to Mr. Sachse for the work he's done, and his tireless effort over the years on this case.
>
> Their objection is that the fee will be paid out of the settlement * * *. [T]he cause of the pollution is Reynolds and Alcoa. They should pay that beyond whatever the offer of settlement is * * *.
>
> * * * So that the Ad Hoc Committee * * * would object to the payment *from the source that it's indicated to be from.*

Supp. App. on appeal Vol. II, pp. 23-24 (emphasis added). This was the *only* objection made to the fees before the district court. Indeed none of the witnesses objecting to the settlement testified against any aspect of the attorneys' fee petition.

The district court issued separate orders approving the settlement and approving the attorneys' fees. Supp. App. Vol. II, 432-433; Supp. App. Vol. II, 434-435. The notice of appeal referred only to the settlement order. Notice of Appeal, Docket No. 348. In light of the lack of testimony opposing attorneys' fees and the statement of petitioner's counsel, the omission of attorneys' fees from the notice of appeal does not appear to have been inadvertent.

The situation here is thus not like *Foman v. Davis*, 371 U.S. 178 (1962) relied upon by plaintiff. Under the circumstances here the court of appeals could reasonably conclude that petitioner had not appealed what he had not contested below. Indeed, had the court of appeals not

so found, it certainly would have held against petitioner on the ground that it had not raised the issue below or would have affirmed on the merits. There is no reason for this Court's review under these circumstances.

The settlement provides significant benefits to the St. Regis people. Distribution of the funds has been long delayed by the unfounded objections of the Ad Hoc Committee. The petition for a writ of certiorari should be denied.

Respectfully submitted,

HARRY R. SACHSE *
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